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No. 05-1559

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SUPREME COURT, U.S.

In The Supreme Court of the United States

CAPTAIN SHERIFF SAUDI,
Petitioner,

v.

NORTHROP GRUMMAN CORPORATION; NEWPORT NEWS SHIPBUILDING INC.; KEPPEL GROUP CORPORATION, d/b/a Keppel Offshore & Marine, Limited, d/b/a Keppel Shipyard (Pte.), Ltd.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondents, Northrop Grumman Corporation ("NG") and Newport News Shipbuilding Inc. ("NNS"), submit that the following question more accurately reflects the issue concerning Federal Rule of Civil Procedure 37(c)(1) presented in the Petition.

1. Whether the district court's exclusion of two of Petitioner's expert witnesses as a sanction under Federal Rule of Civil Procedure 37(c)(1), where Petitioner failed to timely disclose those witnesses, was an abuse of discretion. [1]

[1] A second issue raised in the Petition concerns Keppel Group Corp. and Keppel Shipyard (Pte), Ltd. (who were dismissed prior to the trial for lack of personal jurisdiction), and is not addressed herein.

CORPORATE DISCLOSURE STATEMENT

NG is the parent company of NNS. There is no parent or publicly held company owning 10% or more of NG.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED 9

1. No Conflict Exists Among The Circuits As To The Application Of Sanctions Under Rule 37(C)(1) For Failure To Make Timely Expert Witness Disclosures 9

2. The Fourth Circuit Correctly Determined That The Exclusion Was Not an Abuse of Discretion 11

3. The Petition Raises No Issues of General Importance 14

CONCLUSION 16

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Anderson v. Stephens,
875 F.2d 76 (4th Cir. 1989) 14

Daval Steel Products v. M/V Fekredine,
951 F.2d 1357 (2d Cir. 1991) 10

Dudley v. South Jersey Metal, Inc.,
555 F.2d 96 (3d Cir. 1977) 10

Genentech, Inc v. U. S. Int'l Trade Comm'n,
122 F.3d 1409 (1997) 10, 11

Ingalls Shipbuilding, Inc. v. U. S.,
857 F.2d 1448 (Fed. Cir. 1989) 10

Int'l Union United
Mine Workers of America v. Bagwell,
512 U.S. 821 (1994) 11

Meyers v. Pennypack Woods Home Ownership Ass'n,
559 F.2d 894 (3d Cir. 1977),
overruled on other grounds,
Goodmen v. Lukens,
777 F.2d 113 (3d Cir. 1985), *aff'd*
482 U.S. 656 (1987) 10

Primus v. United States,
389 F.3d 231 (1st Cir. 2004) 10

R.W. Int'l Corp. v. Welch,
937 F.2d 11 (1st Cir. 1991).....10

S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.,
318 F.3d 592 (4th Cir. 2003).....11, 12

Saudi v. Northrop Grumman Corp.,
427 F.3d 271 (4th Cir. 2005).....2, 12, 13, 14

Saudi v. Valmet-Appleton, Inc.,
219 F.R.D. 128 (E.D. Wisc. 2004) 13

Taylor v. Illinois,
484 U.S. 400 (1988) 11

Rules

FED. R. CIV. P. 26 4

FED. R. CIV. P. 26(a).....9

FED. R. CIV. P. 26(a)(2) 13

FED. R. CIV. P. 26(a)(2)(A) 5

FED. R. CIV. P. 26(a)(2)(B) 2, 3, 4, 5

FED. R. CIV. P. 37 9

FED. R. CIV. P. 37(b)(2)(B) 10

FED. R. CIV. P. 37(c)(1).....*passim*

FED. R. CIV. P. 52(c) 2, 9

E.D. Va. L. R. 7(e) 3

E.D. Va. L. R. 45(E) 7

Other Authorities

International Trade Commission
Interim Rule corollary to Rule 37(b) 10

Rules of the United States Claims Court
corollary to Rule 37(b) 10

STATEMENT OF THE CASE

Petitioner, Captain Sheriff Saudi ("Captain Saudi"), asserted various claims based on products liability theories and sought damages for personal injuries he allegedly sustained when a crane, mounted on a vessel, the S/T MARINE ATLANTIC, collapsed while Captain Saudi was being lifted onto another vessel. Captain Saudi's claims against NG and NNS arise from purported defects in the design and manufacture of the crane.[2]

Trial on Captain Saudi's claims against NG and NNS was held on October 12 and 13, 2004, without a jury. The district court granted NG's and NNS's motion to strike two expert witnesses not originally designated by Captain Saudi. After the close of Saudi's case, the district court entered judgment for NG and NNS pursuant to Rule 52(c).[3] *Resp. App.* pp. 1-16.

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[2] Newport News Shipbuilding and Dry Dock Company ("Dry Dock") constructed the S/T MARINE ATLANTIC. The crane, manufactured by Appleton Marine in Wisconsin, was installed on the vessel by Dry Dock some time in or prior to 1979. Dry Dock is a wholly owned subsidiary of NNS, which is a wholly owned subsidiary of NG.

[3] Judgment also was entered in favor of Dry Dock, which Captain Saudi did not appeal. The Appendix submitted with the Petition does not accurately reproduce the record, at least with regard to the judgment entered by the district court. Appendix E, at page 56a – purportedly the Amended Judgment in a Civil Case entered November 19, 2004 – states that judgment was entered only in favor of NG and NNS, whereas, in fact, the Amended Judgment states that judgment was entered in favor of Dry Dock as well. The Amended Judgment is included in the Respondent's Appendix submitted herewith

The district court granted the motion to strike the two experts because Captain Saudi violated an order regarding his experts entered August 5, 2004. *DE* 84. The August 5 Order, in turn, was the result of Captain Saudi's failure to comply with the district court's Rule 16(b) Scheduling Order.[4] *DE* 43

The Scheduling Order required Captain Saudi to identify his expert witnesses by June 11, 2004 and to provide Rule 26(a)(2)(B) expert witness reports

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(*Resp. App.* pp. 1-2) (the Appendix submitted with the Petition is referred to herein as "*Pet. App.*" and Respondent's Appendix as "*Resp. App.*" – portions of the record not included in either appendix are cited to docket entries of the district court, referred to as "*DE,*" and the Fourth Circuit Supplemental Joint Appendix, referred to as "*Fourth Cir. Supp. App.*"). The Appendix submitted with the Petition also failed to include the district court's Order entered January 28, 2005 explaining its basis for entering judgment pursuant to Rule 52(c), and is included in Respondent's Appendix (*Resp. App.* pp. 3-16).

[4] Captain Saudi's violations of the Scheduling Order and the August 5 Order were not his only failures to comply with orders and rules. As noted by the United States Court of Appeals for the Fourth Circuit in its opinion affirming the district court's judgment, written by Judge J. Harvie Wilkinson, III, Captain Saudi's "actions in this litigation presented particular challenges for the district court." *Saudi v. Northrop Grumman Corp.*, 427 F.3d 271, 277-78 (4th Cir. 2005). The Fourth Circuit further stated: "The record is replete with instances when Captain Saudi failed to abide by the district court's rules, including missing deadlines, filing briefs on the day of hearings, and seeking the assistance of counsel while claiming to be proceeding *pro se*." 427 F.3d at 278.

and other disclosures by July 12, 2004.[5] Captain Saudi identified 30 expert witnesses by the June 11 deadline. On July 12 – the deadline for the reports and other disclosures – however, Captain Saudi merely served an "Amended Designation of Experts" that was the same as the document identifying the 30 expert witnesses he had previously served (except that the Amended Designation listed only 28 of the 30 expert witnesses).[6] The Amended Designation failed to comply even minimally with the requirements of Rule 26(a)(2)(B) (among other omissions, it provided no opinions, no bases for opinions, and no reports).

Two weeks after his disclosures were due, Captain Saudi filed a Motion to Extend the Time Within Which to Complete Rule 26(a)(2)(B) Expert Witness Disclosures ("Rule 26(a)(2)(B) Motion"). *Pet. App.* L, pp. 100a – 105a. In his Petition, Captain Saudi wholly mischaracterizes his Rule 26(a)(2)(B) Motion, describing it as "a Motion seeking an enlargement of time within which to *disclose his*

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[5] The Scheduling Order also stated that "[d]iscovery shall be commenced timely." Nevertheless, Captain Saudi served no discovery on NG or NNS until nearly three months after the entry of the Scheduling Order and within six weeks of the discovery cutoff. In his Petition, Captain Saudi complains that he filed a Motion for Relief from the Scheduling Orders that was not ruled on by the district court. He, however, did not set the motion for hearing or otherwise arrange for its disposition as required by a local rule of court. *See* Local Civil Rules, United States District Court for the Eastern District of Virginia ("Local Rules"), Rule 7(e).

[6] A copy of the Amended Designation of Experts is Exhibit 1 to Brief in Support of Defendants' Motion To Strike Plaintiff's Amended Designation of Expert Witnesses. *DE* 78

experts under Rule 26 F.R.Civ.Proc." (Pet. p. 5) (emphasis added). His Rule 26(a)(2)(B) Motion, however, nowhere mentions more time to disclose his experts. Instead, he asked for more time "*to Further Supplement the Expert Opinions and Reports* required by Rule 26(a)(2)(B)," arguing that, at that point in time "*Saudi's expert witnesses cannot give final reports* concerning the defects in design and manufacture . . . ," and he concluded by requesting more time "to supplement expert witness disclosures he has previously made under Rule 26(a)(2)(B) . . . ." (emphasis added). *Pet. App.* L, pp. 100a, 104a.

In response to Captain Saudi's Rule 26(a)(2)(B) Motion, NG and NNS filed a Motion to Strike Plaintiff's Amended Designation of Expert Witnesses, on grounds that, *inter alia*, the designation failed to provide the Rule 26(a)(2)(B) information. *DE* 77, 78.

On August 4, 2004, the district court held a hearing on the motions. At the hearing, consistent with his Rule 26(a)(2)(B) Motion, Captain Saudi requested additional time to provide expert reports. At no point during the hearing did he ask for permission to identify additional experts, or to file reports for individuals that he had not designated. *DE* 85.

In ruling on the motions, the district court stated: "I'm going to give you until August 12th to file the necessary information on your experts" - the experts Captain Saudi had already identified. The court then imposed its sanction: "You are going to be limited to three experts . . . ." *Pet. App.* H, p. 72a,

lines 2-13. The district court's August 5 Order, entered the day after the hearing, reflects that ruling:

> With regard to Plaintiff's Motion to Extend Time Within Which to Complete Rule 26(a)(2)(B) Expert Witness Disclosures, and Defendants' Motion to Strike Amended Designation of Expert Witnesses, the Court Orders the following: By August 12, the Plaintiff shall identify no more than three (3) expert witnesses on the subject of the defective design of the port side handling crane, and provide all the information required by Rule 26(a)(2)(B).

DE 84.

Captain Saudi's mischaracterization of his Rule 26(a)(2)(B) Motion is significant. His Petition is based on the false premise that he was permitted more time to disclose his experts. Yet, in his Rule 26(a)(2)(B) Motion he did not request more time to disclose his experts – rather, he only requested, and the district court only permitted, more time to file reports and the other information required by Rule 26(a)(2)(B).[7]

[7] Rule 26(a)(2)(*A*) concerns the *identification* of expert witnesses, while 26(a)(2)(*B*) concerns the disclosure of *expert witness reports and other information* concerning the expert witnesses. Captain Saudi's Rule 26(a)(2)(B) Motion does not even mention Rule 26(a)(2)(A).

In response to the district court's August 5 Order, Captain Saudi submitted a letter dated August 12, 2004 with materials concerning three purported experts, two of whom, George Moran and Lee Wyman, had not been identified in his prior designations, interrogatory answers, or otherwise.[8] Consequently, NG and NNS filed a second Motion to Strike Amended Designation of Expert Witnesses. *DE* 92, 93.

In the Final Pretrial Order entered by the district court, NG and NNS again objected to Moran and Wyman. *DE* 108, p. 5. At the pretrial hearing, the district court discussed the fact that Moran and Wyman were not among Captain Saudi's designated expert witnesses, and stated: "I don't think I specifically covered that in the order because I don't recall it being an issue at the time of the order." *Pet. App.* I, p. 79a, lines 18-20. The court further stated: "As to the other two [Moran and Wyman] who weren't on the original list, I don't know what to say because I didn't realize what the situation was there because I haven't gone through all of these various motions in reference to the pretrial conference . . . ." *Pet. App.* I, p. 80a, lines 20-24. The court did not at that time rule on the motion to strike.

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[8] A copy of Captain Saudi's August 12, 2004 letter is Exhibit 2 to Brief in Support of Defendants' Second Motion To Strike Plaintiff's Amended Designation of Expert Witnesses. *DE* 93.

Trial was held on October 12 and 13, 2004. [9] At the conclusion of the first day of trial, the district court heard argument on NG's and NNS's second motion to strike, and granted it, stating, in part:

> The Court granted you an extension when you came on August 4th. As counsel points out, I could have said, well, your time's up, you didn't file your expert designations, you can't file any expert designations. But I didn't do that. I said I'll give you until August 12th. And then what you did was you came up with two people who were not even on your original list.
>
> Now, I just wouldn't allow anybody to do that, and I'm not going to make an exception in your case. You simply can't do it. I'm going to grant the motion to strike those two people as experts. If you wish you can file their reports and depositions and whatever else you want to file about what they have to say. But it's simply too great a

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[9] In his Petition, Captain Saudi refers to the district court's denial of his request to subpoena expert witnesses designated by NG and NNS. *Pet.*, pp. 8-9. That request was made during the first day of trial and sought to compel their attendance for the next day. The district court denied the request as untimely. *Pet. App.* J, p. 89a, lines 2-22. A Local Rule states that, except for good cause shown, subpoenas for attendance of witnesses at trials "shall be served no later than 14 days" before the date of trial. Local Civil Rule 45(E).

> violation of this Court's rules to permit you to do what you're seeking to do. And it comes on the heels of so many other requests for special treatment. And I believe I made it clear to you in June that you weren't going to get any more special treatm^nt.

Fourth Cir. Supp. App. p. 209, line 11 - p. 210, line 3.

After the close of Captain Saudi's case, NG and NNS moved for judgment pursuant to Rule 52(c), which the district court granted. *Resp. App.* pp. 1-16.

REASONS WHY THE PETITION SHOULD BE DENIED

1. No Conflict Exists Among The Circuits As To The Application Of Sanctions Under Rule 37(C)(1) For Failure To Make Timely Expert Witness Disclosures

Captain Saudi's assertion that a conflict exists among the circuits as to whether a purported "outcome determinative sanction" may be imposed under Rule 37 absent violation of a "specific order" is patently incorrect.[10] There is no conflict among the circuits – the circuits uniformly interpret Rule 37(c)(1) to mean what it says: "A party that without substantial justification fails to disclose information required by Rule 26(a) . . . is not, unless such failure

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[10] Captain Saudi's assertion also misstates the facts of this case, in two respects. First, the exclusion of Moran and Wyman was not "outcome determinative." Captain Saudi had designated three expert witnesses on the issue of defective design - Moran, Wyman and a third, Salah Mahmoud. Yet, as the district court noted in its Order granting NG's and NNS's motion pursuant to Rule 52(c), Captain Saudi chose not to call Mahmoud, "opting instead to send Dr. Mahmoud home." *Resp. App.*, p. 8. Thus, Captain Saudi's failure to present expert testimony was his own doing rather than the district court's purported "outcome determinative" exclusion. Second, there was a violation of a "specific order" – Captain Saudi violated the August 5 Order when he submitted reports of experts he had not previously identified.

is harmless, permitted to use as evidence at trial . . . any witness or information not so disclosed." [11]

In his Petition, Captain Saudi cites no case that even suggests a conflict in the circuits regarding the application of Rule 37(c)(1). Instead, in a transparent attempt to manufacture a basis for granting his Petition, he simply cites cases involving other rules.[12]

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[11] Compare, for example, the Fourth Circuit's opinion affirming the district court in this case with the First Circuit's opinion in *Primus v. United States*, 389 F.3d 231, 234 (1st Cir. 2004)("The adoption of Rule 37(c)(1) in 1993 gave teeth to a significantly broadened duty to comply with case management orders, and mandatory preclusion is the required sanction in the ordinary case.")(citations and internal quotation marks omitted).

[12] Four of the cases cited in the Petition involved Rule 37(b)(2)(B) (or corollaries thereof) which, by its express terms, concerns the violation of a predicate order before certain sanctions may be imposed. *Genentech, Inc v. U. S. Int'l Trade Comm'n*, 122 F.3d 1409, 1418-20 (1997) (failure to produce documents (International Trade Commission Interim Rule corollary to Rule 37(b)); *R.W. Int'l Corp. v. Welch*, 937 F.2d 11, 14-16 (1st Cir. 1991) (failure to answer deposition questions); *Daval Steel Products v. M/V Fekredine*, 951 F.2d 1357, 1362-65 (2d Cir. 1991) (failure to cooperate at deposition, to produce documents and to comply with subpoena); *Ingalls Shipbuilding, Inc. v. U. S.*, 857 F.2d 1448, 1450-52 (Fed. Cir. 1989) (failure to answer interrogatories (Rules of the United States Claims Court corollary to Rule 37(b)). The other Rule 37 cases cited in the Petition were decided prior to the adoption of Rule 37(c)(1). *Dudley v. South Jersey Metal, Inc.*, 555 F.2d 96, 99-100 (3d Cir. 1977) (ambiguous interrogatory answer not deemed "incorrect when made"); *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 904-05 (3d Cir. 1977) *overruled on other grounds, Goodmen v. Lukens*, 777 F.2d 113 (3d Cir. 1985), *aff'd* 482 U.S. 656 (1987) (local rule excluding witnesses not listed in

The sanction of exclusion of witnesses not timely disclosed may be imposed under Rule 37(c)(1) – indeed, must be imposed, absent justification and harmlessness – even without an order any more specific than a scheduling order. There is no conflict among the circuits.

2. The Fourth Circuit Correctly Determined That The Exclusion Was Not an Abuse of Discretion.

The district court's decision to exclude two of Captain Saudi's expert witnesses is reviewed for abuse of discretion. *S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 595 (4th Cir. 2003).

Saudi's failure to provide the required expert witness disclosures was neither "substantially justified" nor "harmless" under Rule 37(c)(1). Accordingly, the Fourth Circuit correctly determined that the district court did not abuse its discretion in excluding those expert witnesses.

Saudi's proffered justification for failing to make the required disclosures – his purported inability to obtain information from NG and NNS –

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a pretrial memorandum). Indeed, all of these cases were decided prior to the adoption of Rule 37(c)(1) except *Genentech, Inc.* The other two cases cited in the Petition as support for a purported conflict involved contempt proceedings, *Int'l Union United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994) and a criminal case, *Taylor v. Illinois*, 484 U.S. 400 (1988) (affirming exclusion of witness as sanction for failure to disclose).

was not "substantial" given that he waited until months after the entry of the Scheduling Order, and within six weeks of the discovery cutoff, to conduct any discovery. He also failed to timely or properly raise any purported insufficiencies in NG's and NNS's discovery responses or disclosures.

Nor was Captain Saudi's failure to provide the expert disclosures harmless. As stated by the Fourth Circuit in its opinion affirming the judgment:

> Rule 26 disclosures are often the centerpiece of discovery in litigation that uses expert witnesses. A party that fails to provide these disclosures unfairly inhibits its opponent's ability to properly prepare, unnecessarily prolongs litigation, and undermines the district court's management of the case. For this reason, "we give particularly wide latitude to the district court's decision to issue sanctions under Rule 37(c)(1)." This latitude is particularly appropriate here.

Saudi v. Northrop Grumman Corp., 427 F.3d at 278-79, quoting *S. States Rack & Fixture*, 318 F.3d at 595.

Here, after Captain Saudi's failure to timely disclose his expert witnesses, NG and NNS were in the same position as defendants in two related cases filed by Captain Saudi in other courts. In both of those cases, the courts struck Captain Saudi's witnesses pursuant to Rule 37(c)(1) for failing to

make timely disclosures, without giving Captain Saudi further time to provide the disclosures.[13]

By contrast, in this case, the district court did give Captain Saudi additional time to provide the disclosures – an additional month from when they were due. Yet, Captain Saudi still failed to comply

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[13] See *Saudi v. Valmet-Appleton, Inc.*, 219 F.R.D. 128, 130 n. 1 (E.D. Wisc. 2004) (excluding all of Saudi's lay and expert witnesses, and noting that the United States District Court for the Southern District of Texas similarly struck 14 of Saudi's expert witnesses because he failed to timely make his Rule 26(a)(2) expert witness disclosures). As succinctly stated by the Fourth Circuit:

> We hasten to add that as the district court recognized, it could have struck at the outset all of Captain Saudi's expert witnesses as a sanction for his failure to timely file Rule 26 disclosures. This was the course pursued by the district courts in Captain Saudi's Wisconsin and Texas suits, when Captain Saudi similarly did not comply with Rule 26. *See Saudi v. Valmet-Appleton, Inc.*, 219 F.R.D. 128, 134 (2003); *Saudi v. S/T Mar. Atl.*, 2000 WL 33993435 *4 (S.D. Tex. 2000). In this case, the district court generously granted Saudi additional time to file disclosures on three design experts. Saudi's current contention - that the district court order limiting him to three expert witnesses did not require him to select those witnesses from his original Designation - is only an issue because Captain Saudi failed to file Rule 26 disclosures and received initially a lenient response. The district court should not be a victim of its own lenity, nor should Captain Saudi capitalize on his noncompliance with the court's rules.

Saudi v. Northrop Grumman Corp., 427 F.3d at 279.

with the district court's order when he provided reports for expert witnesses he had not previously designated.[14] The district court did not abuse its discretion in excluding those witnesses and the Fourth Circuit properly affirmed the judgment.

3. The Petition Raises No Issues of General Importance.

The exclusion of two of Captain Saudi's witnesses pursuant to Rule 37(c)(1) raises no issues of general importance. The exclusion was a routine

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[14] Captain Saudi's contention that the August 5 Order did not limit him to selecting three of the 30 expert witnesses he had originally identified is belied by the express terms of the order, and the district court's own interpretation of the order, as to which the Fourth Circuit accorded proper deference. *See Anderson v. Stephens*, 875 F.2d 76, 80 n. 8 (4th Cir. 1989) (a district court's interpretation of its own order is entitled to deference). Further, as the Fourth Circuit stated in its opinion:

> To the extent the order is ambiguous, an examination of the record indicates that the district court intended to limit Captain Saudi to his initial Designation. *See In re Tomlin*, 105 F.3d 933, 940 (4th Cir.1997) ("When an order is ambiguous, a court must construe its meaning, and in so doing may resort to the record upon which the judgment was based.") (internal quotation marks omitted). By limiting him to three expert witnesses only, the district court was attempting to cabin Captain Saudi's use of witnesses and place reasonable limits on this freewheeling litigation. Allowing Saudi to select from outside of the initial list would have achieved precisely the opposite result.

Saudi v. Northrop Grumman Corp., 427 F.3d at 279.

and unremarkable result of Saudi's failure to make timely disclosures and failure to comply with the district court's order after he was permitted additional time to make the disclosures.

CONCLUSION

The Petition fails to establish any basis for granting certiorari. There is no conflict among the circuits regarding the authority to exclude witnesses as a sanction under Rule 37(c)(1). The Fourth Circuit correctly determined that the district court's exclusion of two of Saudi's witnesses was not an abuse of discretion. The Petition raises no issues of general importance. The Petition should be denied.

Respectfully submitted,

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